(2)

MAY

No. 00-1500

In the

Supreme Court of the United States

JULIO MENDIOLA,

Petitioner,

v.

JAMES M. SCHOMIG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly determined that, under the AEDPA, the state court determinations at issue were entitled to a presumption of correctness?

2. Whether, the Court of Appeals properly determined that the Petitioner was not entitled to an evidentiary hearing in the United States District Court?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT:

I. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY DETERMINED THAT, UNDER THE AEDPA, THE STATE COURT DETERMINATIONS WERE ENTITLED TO A PRESUMPTION OF CORRECTNESS 4

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER WAS NOT ENTITLED TO AN EVIDENTIARY HEARING IN THE UNITED STATES DISTRICT COURT 16

CONCLUSION 19

TABLE OF AUTHORITIES

United States Supreme Court Cases PAGE(S)

Brady v. Maryland,
373 U.S. 83 (1963) 2

Hernandez v. New York,
500 U.S. 352 (1991) 10

Keeney v. Tamayo-Reyes,
504 U.S. 1 (1992) 16, 18

Kyles v. Whitley,
514 U.S. 419 (1995) 7

Purkett v. Elem,
514 U.S. 765 (1995) 10

Sumner v. Mata,
549 U.S. 539 (1981) 8, 10

Townsend v. Sain,
372 U.S. 293 (1963) 16, 17, 18

Williams v. Taylor,
529 U.S. 420 (2000) 18

Wood v. Bartholomew,
516 U.S. 1 (1995) 7

Other Cases

Burris v. Parke,
116 F.3d 256 (7th Cir. 1997) 18

Drinkard v. Johnson,
97 F.3d 751 (5th Cir. 1996) 11

Keeney v. Tamayo-Reyes,
926 F.2d 1492 (9th Cir. 1991) 16

Lockhart v. Johnson,
104 F.3d 54 (5th Cir. 1999) 11

Mayes v. Gibson,
210 F.3d 1284 (10th Cir. 2000) 11, 12

Mendiola v. Schomig,
224 F.3d 589 (7th Cir. 2000) 10, 11, 13, 14, 15

Morris v. Cain,
186 F.3d 581 (5th Cir. 1999) 11

Murphy v. Johnson,
205 F.3d 809 (5th Cir. 2000) 9

Nobles v. Johnson,
127 F.3d 409 (5th Cir. 1997) 11

Nguyen v. Reynolds,
131 F.2d 1340 (10th Cir. 1997) 12

Porter v. Gramley,
112 F.3d 1308 (7th Cir. 1997) 9

Spreitzer v. Peters,
114 F.3d 1435 (7th Cir. 1997) 9

Torres v. Prunty,
223 F.3d 1103 (9th Cir. 2000) 12, 13, 18, 19

United States v. Provost,
969 F.2d 617 (8th Cir. 1992) 9

United States v. Stewart,
198 F.3d 984 (7th Cir. 1999) 10

Weaver v. Thompson,
197 F.3d 359 (9th Cir. 1999) 11

Federal Statutes

28 U.S.C. §1254(1) 1

28 U.S.C. §2254 ..... 1, 2, 4, 14

28 U.S.C. §1291 1

28 U.S.C. §2253 1

28 U.S.C. §2254(e)(1) 4, 10, 11, 12, 13

28 U.S.C. §2254(d) 8, 10, 11, 12

28 U.S.C. §2254(e)(2) 18

State Statutes

Illinois Supreme Court Rule 366(a)(4) 7

Additional Authority

J. Liebman and R. Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. I, § 20.2d, pp. 756-58, third edition (Lexus Publishing 1998) 16, 17

OPINION BELOW

The August 10, 2000 decision of the United States Court of Appeals for the Seventh Circuit is published at 224 F.3d 589 (7th Cir. 2000). A copy of this decision is included in the appendix to the Petition for Writ of Certiorari at pages 1a-24a. The October 30, 2000 order of the Seventh Circuit which denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reported at 2000 U.S. App. LEXIS 27411 (7th Cir. January 3, 2001). A copy of this order is included in the appendix to the Petition for Writ of Certiorari at pages 58a-59a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its judgment on November 1, 2000, and rehearing was denied on January 3, 2001. Petitioner was granted an extension of time until March 29, 2001 in which to file his Petition for Writ of Certiorari. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The United States District Court for the Northern District of Illinois, Eastern Division, asserted jurisdiction under 28 U.S.C. § 2254. The United States Court of Appeals for the Seventh Circuit exercised jurisdiction under 28 U.S.C. §§ 1291 and 2253. Petitioner Mendiola had appealed from a final judgment of the District Court which denied his petition for a writ of habeas corpus by a person in state custody.

An Illinois jury convicted Mendiola of first degree murder. He was sentenced to a 50-year term of imprisonment. On direct appeal, the Illinois Appellate Court, First District, affirmed the conviction. *People v. Mendiola*, (unpublished order No. 1-95-2874, issued July 21, 1997). The Illinois Supreme Court denied Wilkinson's petition for leave to appeal on December 3, 1997 (No. 83862).

On or about May 18, 1998, Mendiola filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Illinois. With the permission of the District Court, Mendiola subsequently filed, through counsel, an amended petition which raised the same four issues which had been set out in the original petition. Those issues were:

1. Whether the evidence at trial was sufficient to prove Mendiola guilty beyond a reasonable doubt;

2. Whether the introduction of "gang evidence" at trial violated Mendiola's right to due process under the Fourteenth Amendment;

3. Whether the trial judge erred in denying Mendiola's motion for a new trial based upon newly discovered evidence, and;

4. Whether Mendiola was entitled to a new trial based upon allegations that the Prosecution had withheld exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

The latter two claims were based upon a post-trial statement given by a young girl, Maria Balderama, who had testified at trial regarding the events of the murder. Balderama had given a vague general description of the murderer at trial, and had testified that she had not seen the murderer's face and that she could not identify him. In a subsequent statement, given in defense counsel's office and taken down by a court reporter, Balderama stated that, while she was testifying, she realized that Mendiola was not the murderer. She also stated that she told this fact to one of the prosecutors immediately after she had finished testifying. According to Balderama's statement, the prosecutor told her not to tell this to anyone. The district court denied the petition on October 21, 1998, without holding an evidentiary hearing. On November 24, 1998, the district court granted a certificate of appealability on all four issues.

On appeal, Mendiola claimed only that the district court had erred in holding that the state court's rejection of Mendiola's *Brady* claim constituted a reasonable application of settled law and facts. In an opinion issued on August 10, 2000, with one judge dissenting, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the district court. In doing so, the court of appeals noted that, if Balderama actually told the prosecutor what she claimed, the issue became one of the materiality of her claim that Mendiola was not the murderer. The court of appeals indicated that it would be hard to find the state court decisions on that issue to be unreasonable. The court of appeals then stated that it did not need to rest its decision on that ground. That court held that the findings of the state trial court and appellate court, that Balderama had not made the statement in question to the prosecutor, were entitled to a

presumption of correctness under 28 U.S.C. §2254, and that Mendiola had failed to rebut that presumption by clear and convincing evidence.

Mendiola filed a petition for rehearing with a suggestion for a rehearing en banc. The petition for rehearing was denied on October 30, 2000.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY DETERMINED THAT, UNDER THE AEDPA, THE STATE COURT DETERMINATIONS WERE ENTITLED TO A PRESUMPTION OF CORRECTNESS.

Petitioner recognizes that, in federal habeas corpus, a determination of a factual issue made by a state court will be presumed to be correct unless the applicant has rebutted that presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. §2254(e)(1). However, Petitioner claims that the Court of Appeals failed to recognize that state court determinations of fact that are the product of inadequate procedures are not entitled to a presumption of correctness. This is not at all the basis for the Court of Appeals' decision. Rather, the Court of Appeals in this case correctly determined that, to be entitled to a presumption of correctness, a state court finding need not be the result of a full evidentiary hearing and need not be a finding made by a trial court. In support of this determination, the Court of Appeals cited precedent from this Court, from itself and from the court of appeals from other circuits. That court then went on to explain why the state court determinations were supported by the record.

In his post-trial motion in the state trial court, Petitioner claimed that the prosecutors had withheld the fact that, immediately after she left the witness stand, a 13-year-old witness, Maria Balderama, told a prosecutor that Petitioner Mendiola was not the shooter in this murder case. This claim was supported by a court reported statement Balderama had made in defense counsel's office approximately two and one-half weeks after Petitioner was convicted. The statement was the result of a "semi-deposition" of young Maria. With defense counsel and a court reporter present in defense counsel's office, defense counsel asked various questions of Maria regarding her testimony, what she saw on the night of the murder and conversations she allegedly had with the prosecutors. There was no representative of the state present at this "semi-deposition" and, therefore, no cross-examination.[1] Balderama was one of several

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[1] Respondent disagrees with Appellant's representation of how Balderama's court reported statement came about. In his statement of the case, Petitioner indicates that "Balderama approached" defense counsel and explained that she was now certain that Appellant was not the shooter and that she had said so to one of the prosecutors. (Petition for Writ of Certiorari, p. 5) This suggests that Balderama sought out defense counsel and volunteered the information. The state court record seems to indicate otherwise. Petitioner's post-trial motion does say that, after trial, Balderama came to defense counsel's office and gave the information in question. (C105-06) However, the motion does not say how or why she came to the office. When arguing the motion to the trial court, defense counsel stated that "the reason [he] went back" was that he saw Balderama smile at Appellant after she left the stand. He thought that this was unusual, and so, "[he] proceeded to talk to her." (G9) Thus, to the extent that it is relevant, it appears

(continued...)

occurrence witnesses who testified regarding a shooting which occurred on a Chicago street. While on the stand, Balderama had testified that she could not identify the shooter, that the shooter was "not that tall and not that short," that he was "not that fat and not that skinny," that she did not get a good look at the shooter, that she had not seen the shooter's face at all, that she did not remember what he was wearing and that she did not recall if, as several other people testified, he was wearing a hood. However, according to her court reported statement, Balderama realized while she was testifying that Petitioner was not the shooter because Petitioner did not have a pony tail, did not have dark skin and was taller than the shooter. She asserted in her statement that she did not know Petitioner by name but that she had seen him on three occasions in her neighborhood.

During the hearing on Petitioner's motion, after hearing the argument of defense counsel, the prosecutor (Mr. Rogers) who had been one of the two prosecutors at trial, asked for time to read Petitioner's motion. The court passed the matter. When the case was recalled, Rogers stated that he had spoken with the other prosecutor (Mr. Berlin, who was the purported recipient of Maria's post-testimony statements), and that Berlin denied that Maria ever told him that Petitioner was not the shooter. The trial judge specifically found that there had been no conversation in which Maria told the police that Petitioner was not the gunman and that Maria had given a false statement to defense counsel in the presence of the

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[1] (...continued)
that it was defense counsel who approached the 13-year-old girl, and not the other way around.

court reporter. In doing so, the trial judge accepted the denial by Mr. Berlin through the in-court representations of Mr Rogers.

The Illinois Appellate Court, in turn, also determined that the alleged statements had not been made. However, unlike the trial judge, the appellate court never mentioned the statements by Mr. Berlin and Mr. Rogers. Thus, the appellate court apparently relied upon the conflict between Maria's in-court testimony and the later statement, which had been made at defense counsel's office without the presence of opposing counsel, a judge, a jury or other citizens present. The appellate court noted that it had the authority to draw inferences of fact from the record pursuant to Illinois Supreme Court Rule 366(a)(4). The state appellate court also set forth an alternative reason for rejecting Petitioner's "*Brady*" claim. Although a prosecutor has the duty to disclose evidence favorable to the defense, a conviction will only be reversed when the undisclosed evidence is "material" such that there is a reasonable probability that the outcome of the trial would have been different had the evidence been disclosed. *Kyles v. Whitley*, 514 U.S. 419 (1995); *Wood v. Bartholomew*, 516 U.S. 1 (1995). The appellate court found that even if Maria's court-reported statement was not viewed as being incredible, given her testimony regarding her ability to view and identify the shooter and the testimony of the other witnesses, her later statements were not material.

When it denied the petition for a writ of habeas corpus, the United States District Court first noted that the state appellate court had "raised serious questions" as to the veracity of Maria's court reported statement. However, the district court premised its ruling on the fact

that the state appellate court's determination that the "*Brady*" evidence was not material did not constitute an unreasonable application of federal law. Conversely, the United States Court of Appeals for the Seventh Circuit, agreed that the state court's "materiality" determination was, most likely, not unreasonable, but rested its decision on the factual determinations made by the state courts. The Seventh Circuit believed that the process through which the state courts had come to their decisions was sufficient, that their determinations were supported by the evidence in the record and that Petitioner had failed to rebut, by clear and convincing evidence, the presumption that those fact determinations were correct.

Petitioner claims that this determination was flawed because no full evidentiary hearing was held in the state court. To the best of Respondent's research and knowledge, this Court has never stated that state court factual determinations are only entitled to deference if they arose out of a full evidentiary hearing. In fact, this Court's holding in *Sumner v. Mata*, 549 U.S. 539, 546-47 (1981), that state appellate courts' findings are entitled to the same respect that trial judges' findings receive indicates otherwise. In *Sumner*, this Court held that a hearing was sufficient under the (then existing) language of §2254(d) when both parties were formally before the court, the defendant was given an opportunity to be heard, and his claim received plenary consideration. *Sumner*, 449 U.S. at 546. This was true even though (as will be addressed more fully below), at that time, both §§2254(d)(2) and (d)(6) referred to a full and fair hearing in the state court. *Id.* at 544-45. Notably, the Seventh Circuit relied upon *Sumner* when it decided this case. (Appendix to Petition for Writ of Certiorari,

p. 6a) Further, the Court of Appeals for the Seventh Circuit and at least one other circuit have held that a "full and fair" hearing need not be a full evidentiary hearing. The Fifth Circuit has repeatedly held that a paper hearing can be sufficient to afford a petitioner a full and fair hearing on the merits of his issue. *Murphy v. Johnson*, 205 F.3d 809, 816 (5th Cir. 2000). This is especially true where, as in the instant case, the judge assessing the issue is the same judge who presided at the trial. *Murphy*, 205 F.3d at 816. The Seventh Circuit has also previously stated that, to be sufficient, a state court hearing need not be a full-blown evidentiary hearing. The relevant question on habeas review is not so much whether a petitioner has had all the trappings of a full evidentiary hearing, but rather whether the petitioner received careful consideration and plenary processing of his claim, including full opportunity for presentation of the relevant facts. *Porter v. Gramley*, 112 F.3d 1308, 1318 (7th Cir. 1997). In *Porter*, the court held that the petitioner had had a full opportunity to present his claims even though he never received an official evidentiary hearing. *Id.*; *see also Spreitzer v. Peters*, 114 F.3d 1435, 1456 (7th Cir. 1997) (evidentiary hearing not necessary when the facts essential for consideration of the constitutional issue are already before the court). Other cases cited by the Court of Appeals in support of its finding teach that this is particularly true when, as here, the matter at issue involves recantations of statements made under oath. (Appendix to Petition, pp. 6a-7a) The Eighth Circuit noted that the need for an evidentiary hearing on a motion for a new trial is diminished when there is a claim of recanted testimony and the judge ruling on the motion observed the testimony at trial. *United States v. Provost*, 969 F.2d 617, 619 (8th Cir. 1992). That

court went on to note that, while there is contrary precedent, a majority of the Circuits hold that a recantation issue can be decided without an evidentiary hearing. *Id.*; *see cf. United States v. Stewart*, 198 F.3d 984 (7th Cir. 1999) (statements made under oath while pleading guilty are conclusive and a judge may reject without a hearing a defendant's later contention that his sworn statements were untrue). All of these circuit court holdings are consistent with the logic and holding of this Court in *Sumner*.

As further noted by the Court of Appeals below, other cases decided by this Court indicate that a full evidentiary hearing is not necessary. When dealing with allegations that prosecutors exercised peremptory challenges improperly, judges are entitled to credit prosecutors' explanations without placing them under oath. (Appendix to Petition, p. 7a) (*citing Purkett v. Elem*, 514 U.S. 765 (1995) and *Hernandez v. New York*, 500 U.S. 352 (1991))

In further support of its ruling, the Seventh Circuit noted a significant change in the Federal Habeas Corpus statute. (Appendix to Petition, p. 6a) Unlike its predecessor statute, 28 U.S.C. §2254(d) (1994), the language of §2254(e)(1) after the AEDPA does not require state court factual findings to be based on evidentiary hearings. The former statute required deference to "a determination after a hearing on the merits of a factual issue" unless one of eight conditions was satisfied. By contrast, §2254(e)(1) omits any mention of a hearing. Certainly, Congress meant for this change to have some result. Thus, the Seventh Circuit's holding that state court factual findings are entitled to a presumption of correctness even if they do not result from a full evidentiary

hearing is supported by precedent from this Court, precedent from several Circuits of the Court of Appeals, the plain language of §2254(e)(1) and by the decision of Congress to change that language.

Respondent also notes that the cases cited by Petitioner do not support his assertion. Petitioner cites to *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999). However, *Weaver* does not involve an analysis of whether a state court's finding arose from an adequate procedure. Rather, the court in that case simply determined that the presumption of correctness did not apply because there was no "factual determination" as required by §2254(e)(1). *Weaver*, 197 F.3d at 363. *Morris v. Cain*, 186 F.3d 581 (5th Cir. 1999), to which Petitioner also cites, is similarly distinguishable. That is, it does not deal with the issue for which it is apparently cited. The language Petitioner has cited from *Morris* does not deal with the §2254(e)(1) presumption of correctness. (Petition, p. 17) Rather, that language, and the language in the cases on which *Morris* relies, deal with the deferential standard of review in federal habeas cases as set forth in §2254(d). *Morris*, 186 F.3d at 584; *Nobles v. Johnson*, 127 F.3d 409, 416 (5th Cir. 1997); *Lockhart v. Johnson*, 104 F.3d 54, 56-57 (5th Cir. 1997); *Drinkard v. Johnson*, 97 F.3d 751, 766-69 (5th Cir. 1996). Petitioner's attempt to interject §2254(d) into an analysis of the opinion below is unpersuasive. The Seventh Circuit clearly rested its decision on §2254(e)(1). (Appendix to Petition, pp. 5a-8a)

Appellant also cites to *Mayes v. Gibson*, 210 F.3d 1284, 1289 (10th Cir. 2000) for the proposition that federal courts need not give the presumption of correctness to factual findings of the state court if the habeas petitioner did not receive a full, fair and adequate hearing in

the state court on the relevant issue. (Petition for rehearing, p. 14) Initially, this citation begs the question of what constitutes an adequate hearing. More importantly, it should not be relied upon because it is based upon pre-AEDPA law. The court in *Mayes* relied upon the case of *Nguyen v. Reynolds*, 131 F.2d 1340, 1359 (10th Cir. 1997) for the proposition cited above. *Mayes*, 210 F.3d at 1289. Unfortunately, the court in *Nguyen* declined to apply the AEDPA. *Nguyen*, 131 F.3d at 1345. Thus, that case was decided under §2254 before the change (stressed by the majority here) which removed the previous specific reference to a hearing on the merits. *See* 28 U.S.C. §2254(d)[superceded] (1995); 28 U.S.C. §2254(e)(1) (1997).

It is true that in another case cited by Petitioner, *Torres v. Prunty*, 223 F.3d 1103 (9th Cir. 2000), the Court of Appeals held that a state court's fact finding procedure was inadequate. However, that case did not involve the same factual circumstances or issue presented here. *Torres* dealt with the question of whether a defendant was competent to stand trial, not the believability of a post-trial assertion that is inconsistent with a witness's sworn testimony. More importantly, it is apparent that the holding in *Torres* was fact driven. That court stated that "[I]n light of the previous medical evaluation by Dr. Wells, it was unreasonable for the court not to make a more complete inquiry." *Torres* 223 F.3d at 1109. In support of its finding that the trial court should have held a hearing that court also stressed the fact that the defendant's counsel had twice related to the court that the defendant believed that counsel and the court were part of a broader conspiracy against the defendant and that counsel believed a competency hearing would be appropriate. *Id.* That court also stressed that the defen-

dant's unusual and self-defeating behavior in the courtroom suggested that an inquiry into his competency was required. That court also stated that "[o]n these facts" merely observing the defendant's demeanor in court was insufficient. *Id.* It later stated that under the applicable standard and "[i]n the face of this evidence" the trial judge erred when he ruled that no hearing was needed. *Id.* at 1110. Finally, that court stated that a consideration of all the evidence before the state courts led it to conclude that there had been a bona fide doubt of that defendant's competence to stand trial. *Id.* Like the court in *Torres*, the majority here conducted an analysis to determine if, on the facts in this record, the presumption of correctness should apply. It simply reached a different conclusion based upon different facts.

The Court of Appeals analyzed the basis for the state courts' decisions. Appendix to Petition, pp. 5a-8a. It cited precedent for the foundations of its determination that the decisions of the state courts reasonably determined that no "Brady" violation occurred. It cited to precedent from this Court for the proposition that the factual findings of a state appellate court are entitled to deference under §2254(e). *Id.* at 6a. It cited to two other cases from this Court for the proposition that, under some circumstances, a judge may credit the representations of prosecutors without placing the prosecutor(s) under oath. *Id.* at 7a. It cited to decisions of the Court of Appeals for the proposition that a judge may reject, without a hearing, a subsequent claim that statements made under oath were false. *Id.* at 6a-7a. It cited to yet another case from this Court and a legal treatise in support of the proposition that disbelief of recantations is reasonable. *Id.* at 7a-8a. Also, the Court of Appeals correctly noted that, after the changes made in the Antiterrorism and Effec-

tive Death Penalty Act of 1996 (the AEDPA), the subsection of §2254 which deals with the presumption of correctness no longer requires that the presumption be based upon an evidentiary hearing. *Id.* at 6a. Finally, the majority stated that if a state court's finding rests on thin air the petition will have little difficulty in satisfying the standards for relief under §2254, but that if the state court's decision is supported by the record, although not by a hearing on the merits of the factual issue, the finding is presumed to be correct. *Id.* at 6a. The Court of Appeals applied these principles to the facts of this case. It noted that the prosecutors denied the purported conversation with Balderama, that in analogous circumstances courts are entitled to credit prosecutors' explanations without placing them under oath, and that by falsely denying Balderama's post-trial assertion the two prosecutors involved in this case would be putting their law licenses and careers in jeopardy. *Id.* The majority then noted that disbelief in recantations is sensible and reasonable for several reasons. It noted the fact that, unlike the original testimony, recantations like the one here are not made under the assurances associated with in-court testimony and, conversely, may be subject to the skill and influence of the losing advocate and the perhaps less wholesome influence of the defendant's friends. *Id.* at 7-8. In this regard, the state trial judge who denied Appellant's post-trial motion was the same judge who presided at trial and, therefore, had heard Balderama's testimony and witnessed her demeanor while testifying. *Id.* at 3-4. Also, the murder here occurred outside a funeral home during the wake for a member of the Latin Kings street gang. *Id.* at 1. The majority noted that, although he denied it under oath, there was considerable evidence that Appellant

was a member of the Latin Kings. *Id.* at 2. It noted that several of the witnesses who corroborated Appellant's alibi testimony or testified that Appellant was not the shooter were Latin Kings. *Id.* It noted that while the murder occurred during broad daylight on a busy street, the police and prosecutors had difficulty finding people willing to cooperate. *Id.* at 1-2. It noted that there was testimony that Balderama was very scared and hesitated to view a line-up until she was assured that the people in the line-up could not see her. *Id.* at 3. Finally, the majority opined that people fear the Latin Kings for a reason. Of course, this statement is supported by the gang-related nature of the beating and killing involved here as well as by the fact that the jury obviously believed that Appellant and several of his witnesses perjured themselves in order to gain an acquittal for Appellant. In sum, it is perfectly clear that the Court of Appeals here held no more than that, under the facts of record in this case, the state courts each made a reasonable determination and that it is not appropriate for a federal habeas court to tamper. The Court of Appeals did not find that a federal habeas court must defer to any state court factual finding regardless of the process by which that finding was made. It correctly noted that a formal hearing was no longer a prerequisite for the presumption to apply and then explained why the inquiry and finding in this case was reasonable. In short, the majority carefully and correctly analyzed the issue before it. Therefore, this Court should not grant certiorari.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT THE PETITIONER WAS NOT ENTITLED TO AN EVIDENTIARY HEARING IN THE UNITED STATES DISTRICT COURT.

Petitioner next contends that the Court of Appeals ignored the difference between his entitlement to federal habeas relief and his entitlement to a hearing before the habeas court. Specifically, Petitioner claims that the majority confused the law regarding the presumption of correctness of state court findings of fact with the law regarding the right to an evidentiary hearing in a federal habeas court. In sum, Petitioner claims that the Court of Appeals remanded to the District Court for an evidentiary hearing because he did not have a full evidentiary hearing on his "Brady" claim in the state courts. Petitioner is wrong.

It is true, as Appellant states, that a habeas petitioner is entitled to an evidentiary hearing under several circumstances enumerated by this Court. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Townsend v. Sain*, 372 U.S. 293 (1963). While it is true that the question of when a federal hearing is required and when the state court findings are presumed to be correct are separate, they also overlap. J. Liebman and R. Hertz, *Federal Habeas Corpus Practice and Procedure*, Vol. I, § 20.2d, pp. 756-58, third edition (Lexus Publishing 1998). The sets of criteria for analyzing the two questions are "obviously intertwined." *Id.* at 757 (*quoting Tamayo-Reyes*, 504 U.S. at 20-21) (O'Connor, J., dissenting); *see also Keeney v. Tamayo-Reyes*, 926 F.2d 1492, 1498 and n. 13 (9th Cir. 1991), *rev'd on other grounds*, 504 U.S. 1 (same basic criteria still generally employed in both the *Townsend* and §2254(d) inquiries and in most cases the inquiries will merge).

In *Townsend*, this Court held that a habeas petitioner is entitled to an evidentiary hearing in six circumstances in which one could not be confident that the state-court trier of fact has after a full hearing reliably found the relevant facts. *Townsend*, 372 U.S. at 313. These are:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id.; *see also Federal Habeas Corpus Practice and Procedure*, §20.1b, pp. 732-33 and cases cited therein (habeas petitioner is entitled to a federal evidentiary hearing when: (1) the petition alleges facts which, if proved, entitle the petitioner to relief; (2) the fact-based claims survive summary dismissal because they are not "palpably incredible" or "patently frivolous or false," and; (3) the factual claims were not the subject of a full and fair hearing in the state courts or the state court hearing did not result in fact findings that resolve all the controlling factual issues in the case).

In substance, the inquiry into what constitutes a full and fair hearing is the same for the purposes of the questions of an evidentiary hearing or the presumption of correctness. The question is whether the state court made a factual determination on an issue after affording

a petitioner a full and fair opportunity to present the material facts. As set forth in Reason for Denying Certiorari I, a "full and fair" is not synonymous with a full formal evidentiary hearing. Moreover, as also set forth in Reason for Denying Certiorari I, the Court of Appeals here carefully and properly analyzed the issue at hand.

Finally, Petitioner's criticism of the Seventh Circuit's opinion in *Burris v. Parke*, 116 F.3d 256 (7th Cir. 1997) is wide of the mark. That case did not hold that §2254(e) limited generally a petitioner's right to an evidentiary hearing under *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992) and *Townsend v. Sain*, 372 U.S. 293 (1963). That court's comments on the effect of §2254(e)(2) on the right to a hearing were made in dicta. The holding in that case was that the petitioner there was not entitled to a hearing under the standard of *Townsend*. *Burris*, 116 F.3d at 258-59. Moreover, this Court has since spoken to the effect of §2254(e)(2) on a habeas petitioner's right to a hearing in federal court. *See Williams v. Taylor*, 529 U.S. 420 (2000). Notably, the Seventh Circuit in *Burris* correctly predicted that the language of §2254(e)(2) regarding a petitioner's failure to develop the factual basis for a claim in state court could not be read in a strict-liability fashion. *Williams*, 529 U.S. at 431-32; *Burris*, 116 F.3d at 258-59. Thus, in *Burris*, the Seventh Circuit judges whom petitioner attacks correctly interpreted the law in dicta. Clearly, this does not call into question the logic of those judges in the instant case.

Finally, Petitioner claims that he is caught in a vicious catch-22 because he cannot disprove the presumption of correctness without an evidentiary hearing. (Petition, p. 22) However, a case cited by Petitioner disproves this assertion. *See Torres v. Prunty*, 223 F.3d 1103 (9th Cir.

2000). The defendant in *Torres* succeeded in doing exactly what Petitioner claims cannot be done. Based upon the state court record, which did not include a full evidentiary hearing on the issue involved, he defeated the statutory presumption of correctness and obtained relief.

CONCLUSION

For the reasons set forth above, Respondent, James M. Schomig, respectfully requests that this Honorable Court deny the petition for writ of certiorari.

Respectfully submitted,

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